UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE

EXECUTIVE MANAGEMENT SERVICES,)	
SERVICES,)	
Employer,)	
V.)	CASE 25-RC-093670
v.)	CASE 25-RC-073070
INTERNATIONAL UNION UNITED,)	
AUTOMOBILE, AEROSPACE AND)	
AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA (UAW),)	
)	
Defendant.)	

BRIEF IN SUPPORT OF THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT

Just found out that GM purchasing has committed to the uaw inl union to compensate EMS for your wage and benefit increases if you guys form your union. Great news!!!

Less than 24 hours before the NLRB election, organizers of the International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW" or the "Union") revealed an unexpected and dramatic development to the Executive Management Services ("EMS") employees eligible to vote: They had "just found out" that General Motors ("GM") had agreed to subsidize the employee's wages *if the workers voted in favor of the Union*. Not surprisingly, the Union's representations had exactly the impact the Union intended. Rather than the close election that had been anticipated, workers voted overwhelmingly in favor of union representation.

In addressing EMS's objections, the Hearing Officer justified the Union's last-minute announcement of the GM-UAW deal as a mere recitation of "historical fact." This conclusion was in error and contrary to the evidence. The evidence presented at the hearing established that

in 2007, the UAW permitted GM to outsource its housekeeping work to other contractors, provided that GM committed to pay those contractors enough to permit them to pay their employees a "fair wage" (hereinafter, the "2007 Commitment"). According to the Union's own witness, under the 2007 Commitment, any contractor that dealt with GM would be paid enough to pay its employees a living wage, *regardless of whether those employees were organized*. In contradicting this evidence, the Hearing Officer found that the Union's last minute revelation to workers about a GM subsidy was accurate because under the terms of the 2007 Commitment, "GM only offered the higher contractual rate to subcontractors whose employees are organized." (Report at 9.) This finding is in error and must be overturned.

Quite simply, the Union did not represent "historical facts" to the EMS workers with regard to the 2007 Commitment. If it had, the Union would have told EMS employees that extra funds would be made available to EMS to supplement wage increases regardless of whether the Union won the election. Instead, the Union described a deal with GM that was qualitatively different. In the Union's own words, the Union "[j]ust found out that GM Purchasing has committed to the uaw inl union to compensate EMS for your wage and benefit increases *if you guys form your union*." (Report at 5 (emphasis added).) Thus, the terms of the agreement revealed by the UAW on the eve of the election were that the GM subsidies would be available if, *and only if*, the workers chose to be represented by the UAW.

By misrepresenting the terms of the 2007 Commitment, the Hearing Officer justified the Union's eleventh hour inducement as a "historical fact." But the deal that the Union announced to the workers was different than the historical understanding reached in 2007. This puts the Union in an untenable situation. Either the UAW made a material misrepresentation to the workers about the terms of the 2007 Commitment, or the UAW negotiated a last-minute deal with GM on behalf of the EMS workers even though the UAW was not the representative of the

workers. Either way, the Union's actions crossed the line and infringed the EMS employees' Section 7 rights in violation of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A).

I. <u>Background</u>.

A. Factual Background

The UAW and GM have a 65-year history of collective bargaining. (Mince, Tr. 208:10-12.) In 2007, the UAW agreed to allow GM to begin outsourcing its housekeeping work to non-GM contractors, so long as GM committed to paying those contractors enough to pay their workers a "living wage." (Report at 3.) Rich Mince, who was in the UAW's GM Department in Detroit in 2007, testified concerning this undocumented understanding:

When I worked in the GM department through the 2007 negotiations, obviously for us when we give up any jobs, it's a concessionary type agreement. . . . [S]o the commitment that we understood from our international leadership at that time was that they needed to exit, but they made a commitment that they would give a fair wage to any contractor that came in to enable them to give what would be considered a fair wage to their employees in our plants because they were going to be in our plants working alongside all of our members.

(Mince, Tr. 197:5-14.) Notably, Mince never testified that the agreement between GM and UAW was contingent on a subcontractor's workers being organized. To the contrary, "[o]ur staff was told that [GM] committed to anybody they brought in had to be willing to give a fair wage." (Mince, Tr. 197:19-20.)

EMS was awarded a contract by GM purchasing through a competitive bid process to provide commercial cleaning services at General Motors Component Holdings, LLC ("GMCH"), in Kokomo, Indiana, beginning in January 2012. (Bigelow, Tr. 145:14-15, 23-25; 146:15-21.) In November 2012, the UAW filed a petition for representation and an election was set by stipulation for January 8, 2013.

EMS and the Union both campaigned in the month leading up to the election. EMS informed the workers that its contract with GMCH provided specific amounts that were available to be used for employee wages and benefits, and thus its ability to offer wage and benefit increases was limited by its contract with GMCH. (Dowling, Tr. 276:14-20.) When this information was relayed to Mince, he was surprised to hear that EMS was not paying more. (Mince, Tr. 198:9-12.) Without the benefit of seeing the EMS-GMCH contract, Mince testified that "the conclusion I had to draw was that the contractor was, in fact, getting what GM had committed to and not passing it on to the members or employees or that they were, in fact, not at that time paying what they had committed to the company to provide what we considered a fair wage." (Mince, Tr. 199:25-200:5.) To Mince, either EMS was pocketing an undue portion of the contract payments, or GM was not living up to the 2007 Commitment.

On January 7, 2013, the day before the election, Lyneé Walters, the UAW International Representative who was organizing the employees, contacted Carl Vareen, a labor relations representative with GM in Detroit, Michigan. (Report at 4.) Vareen told Walters that "GM had committed to compensate EMS for any bargaining wage and benefit increases" negotiated by the UAW at the bargaining table. (Walters, Tr. 106:17-20; 114:22-24.) Vareen verified that Walters could communicate this information to the employees. (Report at 4.)

That afternoon, the UAW held a meeting for EMS's workers at a local Pizza Hut. (Report at 4-5.) The employees received notice of the meeting via text messages sent by Walters. (*Id.* at 5.) In one such text message, Walters revealed the news from Vareen: "Just found out that GM purchasing has committed to the uaw inl union to compensate EMS for your wage and benefit increases if you guys form your union. Great news!!!" (*Id.*) Another EMS employee, Teresa Griffith, was invited to the Pizza Hut meeting by Ian Beaty, a UAW committeeman. (*Id.* at 4.) Beaty gave Griffith a flyer which lists a number of GM plants and states: "Janitorial wages in

UAW/GM plants: \$14.88 hr. – Paid Holidays, Vacations, Bereavements, Health Care Plans, etc." (*Id.* at 5.) Beaty told Griffith that the UAW had just received word that "GM was going to supplement the pay that EMS say[s] they don't have." (*Id.* at 4.)

About half of the eligible voters attended the Pizza Hut meeting. (Report at 5.) During the meeting, Walters reiterated that GM had agreed with the UAW to subsidize wage increases and benefits negotiated at the bargaining table. (*Id.*) The UAW also distributed the flyer which stated that all UAW housekeepers who worked in GM plants received an hourly wage of \$14.88 plus benefits. (*Id.*) Two UAW members who worked as housekeepers at other GM facilities spoke about the substantial gains that they had made at the bargaining table after unionizing. (*Id.*) The EMS employees understood the representations made by Walters to mean that GM was going to subsidize a wage increase for the employees. (Report at 6.) *The Union represented – and the employees understood – that they had to vote in favor of the Union to access these GM subsidies*. (Walters, Tr. 106:21-23; Dowling, Tr. 278:16-24.)

"The meeting left a big impression on employees—especially the \$14.88 wage rate listed on the flyer." (Report at 6.) Word of the agreement between the UAW and GM spread to the other EMS employees who had not attended the meeting. (*Id.*) For example, employee Corine Snow received a phone call from her coworker Meredith Fowler, who encouraged Snow to vote "Yes" because GM was going to subsidize \$5 or \$6 of pay. (*Id.*)

The next day, January 8, was election day. After the UAW told the employees that GM would subsidize an increase in wages if the workers organized, the Union cruised to a victory. With 27 eligible voters, the final tally was 20 to 5 in favor of the Union, with one ballot challenged by the Union.

Believing that the Union's announced last-minute deal with GM unlawfully tainted the election results, EMS filed objections. The Regional Director ordered a hearing on the objections and set forth four issues for review:

- (1) Whether, during the critical period between the filing of the petition and the election, representatives of the UAW negotiated terms and conditions of employment with General Motors on behalf of the bargaining unit employees even though the UAW is not the employee's exclusive collective bargaining representative.
- (2) Whether representatives of the UAW made material misrepresentations to employees during the critical period regarding the terms of an agreement they had negotiated with General Motors.
- (3) Whether, during the critical period, representatives of the UAW failed to apprise employees of the contingent nature of its agreement with General Motors and/or of the implications of a billing rate increase if it occurred.
- (4) Whether, during the critical period, agents of the UAW represented to employees that the UAW had the authority to negotiate wage increases on behalf of employees, even though the UAW does not represent them and General Motors does not employ them or otherwise control their terms and conditions of employment.

(See Report on Objections, Order Directing Hearing, and Notice of Hearing.)

B. Hearing Officer's Report

Following a two-day hearing, Hearing Officer Kimberly Sorg-Graves issued her report and recommendation on April 12, 2013. In her report, the Hearing Officer agreed that: (1) "[t]he credible evidence reveals that Lynne Walters told employees that General Motors would supplement wage increases and benefits that were negotiated at the bargaining table"; (2) that the UAW's representations "left a big impression on employees—especially the \$14.88 wage rate listed on [the UAW's] flyer"; and (3) that EMS was not notified of the arrangement between the UAW and GM until after the afternoon voting session started on January 8. (Report at 5-6.)

Nonetheless, the Hearing Officer overruled the objections. With regard to EMS's first and fourth objections, she found that the evidence did not establish that the UAW negotiated

terms and conditions of employment for the bargaining unit employees with GM or any other entity. (Report at 7, 11.) According to the Hearing Officer, "[t]he UAW [only] sought to hold General Motors to its long standing commitment to the UAW that it would pay housekeeping contractors at a rate that would enable those contractors to pay a living wage to their employees if they negotiated higher wages and benefits." (*Id.* at 7.) With regard to EMS's second objection, she concluded that the evidence did not establish "that the UAW made false statements regarding General Motor's commitment to supplement the contract between GMCH and EMS in order to sway employees' votes." (*Id.* at 8.) Instead, the UAW merely "told the employees a historical fact," namely that "General Motors has paid subcontractors of unionized housekeeping employees a rate that allows the subcontractors to pay their employees a 'living wage' in the \$14.88 range and some benefits." (*Id.* at 9.) To the Hearing Officer, this was a result of the 2007 Commitment, which she found was only available to "subcontractors whose employees are organized." (*Id.*)

II. <u>Legal Argument</u>.

Hearing Officer Sorg-Graves erred in her findings and conclusions with regard to the Employer's first, second and fourth objections. EMS accordingly files exceptions to those portions of the Hearing Officer's report and recommendation. (*See* Report at 6-9.)

"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). In evaluating whether a party's conduct undermined these laboratory conditions, the Board reviews whether "the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 N.L.R.B. 868, 868 (1984). When the conduct of any of the parties "creates an atmosphere which renders improbable a free choice," the NLRB should

invalidate the election and order that the "experiment . . . be conducted over again." *Gen. Shoe Corp.*, 77 N.L.R.B. at 126-27.

In the instant case, the Hearing Officer excused the Union's promise of access to the GM subsidies as being merely the recitation of a historical fact. In light of the record evidence, this was plain error. The evidence showed that the agreement revealed by the Union on the eve of the election had at least one very crucial difference from the 2007 Commitment. In the 2007 Commitment, GM agreed to pay its subcontractors a sufficient amount to pay employees a "living wage," regardless of whether the subcontractor's employees were organized. The 2007 agreement was not the one that the UAW asked GM to honor, nor is it the one that was recounted to the EMS employees. Instead, the UAW representatives told the employees that the GM subsidies were contingent on the employees selecting the Union as their representative.

By excusing the UAW's promises of access to the GM subsidies as a "historical fact," the Hearing Officer failed to follow the evidence to its logical conclusion. Either the Union misrepresented the terms of the 2007 Commitment by falsely stating that the commitment was contingent on union representation, or the Union negotiated a new eleventh-hour agreement with GM to make new funds available to the Union at the bargaining table *if the UAW were elected*. Either way, the Union's actions violated the EMS employees' rights to be free from coercion.

A. Objection 2: The evidence shows that the Union materially misrepresented the terms of the 2007 Commitment, namely by advising employees that the commitment was contingent on union representation.

The Hearing Officer excused the Union's last-minute announcement about the deal with GM as merely reciting the 2007 Commitment. The "understanding" that was revealed by the Union on the eve of the election was materially different from the 2007 Commitment, however. According to Mince, GM agreed in 2007 "that they would give a fair wage to any contractor that came in to enable them to give what would be considered a fair wage to their employees in our

plants because they were going to be in our plants working alongside all of our members." (Mince, Tr. 197:7-14.) That commitment to pay the contractors a reasonable amount would apply regardless of whether the employees were represented by the Union. (Mince, Tr. 197:19-20 ("Our staff was told that [GM] committed to anybody they brought in had to be willing to give a fair wage.").) In contrast, the Union told the employees on the eve of the election that they would only have access to the GM subsidies "if you guys form your union." (Report at 5 (emphasis added).)

The Hearing Officer attempted to reconcile the 2007 Commitment with the last-minute representations made by the UAW by concluding that GM "only offered the higher contractual rate to subcontractors whose employees are organized." (Report at 9.) Notably, the Hearing Officer arrived at this conclusion independently of any evidence or argument offered by the UAW. Both the UAW's own brief and the testimony of Mince, a witness for and called by the Union, specifically indicate that that there was no requirement of unionization in the 2007 Commitment. The Union described the 2007 Commitment in its brief:

During contract negotiations in 2007, the UAW acceded to a request from GM that because of financial exigencies it be permitted to outsource the housekeeping work to contractors. As the housekeeping employees of contractors would work alongside UAW members employed by General Motors, the UAW was obviously concerned that these employees receive a fair wage. In connection with the agreement permitting it to outsource housekeeping work, GM committed to act as a responsible corporate citizen and pay enough to the contractors to permit them to pay their employees a fair wage.

(UAW's Post-Hearing Br. on Objections at 5.) Thus, even the Union recognized that the 2007 Commitment was really about the amount of money to be paid to *any* outsourced housekeeping contractors, not those whose employees were organized.

Logically, if the 2007 Commitment were limited to contractors whose employees were organized, the testimony offered by Mince makes no sense. Mince testified that he was surprised

to hear that EMS was paying its employees around \$9.00 an hour, because under the terms of the 2007 Commitment, GM was supposed to be paying EMS a sufficient amount so that it could pay its workers a "fair wage." (Mince, Tr. 198:9-12.) As Mince put it, "the conclusion I had to draw was that the contractor was, in fact, getting what GM had committed to and not passing it on to the members or employees or that they were, in fact, not at that time paying what they had committed to the company to provide what we considered a fair wage." (Mince, Tr. 199:25-200:5.) If the 2007 Commitment only applied to contractors whose workers were organized, Mince would not have questioned what EMS was paying its employees. He would simply have understood that EMS was paying its employees less because its workers were not organized, and so therefore the benefit of the 2007 Commitment did not apply to EMS. The Hearing Officer ignored this testimony entirely and in so doing, erred.

The case cited by the Hearing Officer to support her characterization of the last-minute representation as a historical fact, *Viacom Cablevision*, 267 N.L.R.B. 1141 (1983), actually supports EMS's position. In *Viacom*, the employer distributed letters to the employees which showed, *inter alia*, (1) that wages in its nonunion systems were higher than in its unionized systems, and (2) that wages in nonunion systems had always been increased yearly. The Board found that the employer's letters were not objectionable because the "[e]mployer did no more than truthfully inform the employees of wages enjoyed by other employees in other . . . systems and made statements of historical fact concerning the yearly increases which had been given elsewhere in the past." *Id.* at 1141-42. In addition, the employer "credibly denied making any guarantees or promises about what would happen if the [u]nion were voted out." *Id.* at 1141.

Here, if all the Union had done was pass out a flyer which stated that other unionized shops were receiving \$14.88 plus benefits and that the Union was not making any promises or guarantees, perhaps its actions would pass muster under *Viacom*. *See id.* at 1141 ("A comparison

of wages is not *per se* objectionable"). But Union representatives went one fatal step further: they announced that they had received a firm commitment from GM to subsidize wages for the employees at the bargaining table if the employees selected union representation. The two housekeeping employees who were UAW members bolstered this point by speaking about the gains they made after unionizing. (Report at 5.) The employees reasonably understood this to mean that they had to vote "Yes" "because General Motors said it would supplement \$5 or \$6 of pay." (*Id.* at 6.) Thus, there was a promise, "either express or implied from the surrounding circumstances, that wages would be adjusted if the Union" won the election. *Viacom*, 267 N.L.R.B. at 1141. Rather than merely looking back at historical facts, the UAW assured the workers that they would receive wage increases if the Union won the election.

In this way, the Union's conduct parallels an employer's conduct found to be coercive in *G & K Servs., Inc.*, 357 N.L.R.B. No. 109, 2011 WL 5374193 (Nov. 7, 2011). In that case, during the course of a decertification campaign, the employer distributed a chart comparing employees' benefits with those offered at another nonunion facility. *Id.* at *1. The employer then mailed a letter to the employees, intended to reach the employees one to two days before the election, which linked another facility's recent decertification election with the availability of family health insurance. Recognizing that it "has long held that even comparisons and statements of fact may, depending on their precise contents and context, nevertheless convey implied promises of benefits," the Board found that the employer's letter to the eligible voters was coercive and not "merely a benefit comparison or a report of a historical fact." *Id.* at *2-3.

Likewise, the Union's statements in this case "went beyond a description of historical fact and constituted an implied promise of benefits suggesting the [Union] would reward the employees if they voted [in favor of] the Union." *G & K Servs*. 2011 WL 5374193 at *5. Although the UAW has disclaimed making "any promises," its disclaimers were immaterial

given the specific benefit of GM subsidies that the Union promised would be available if it won the election. *Id.* at *4.

The circumstances surrounding Walters's announcement to the EMS employees further demonstrate that the last-minute "understanding" was framed as a promise of future benefits rather than an explanation of a historical commitment. The Union did not reveal the "understanding" as a longstanding commitment from GM to the UAW. Rather, Walters's statements in her texts and at Pizza Hut intimated an eleventh hour deal. To paraphrase, Walters "[j]ust found out" some "[g]reat news!!!" (Report at 5.) Likewise, the timing of the announcement is highly suspect. If in fact the UAW was relying on its historical agreement, why was it not announced to the employees until the 24-hour window before the election – when EMS had insufficient time to verify the information and to respond to the Union's claim?

The Hearing Officer erred by finding that the representations made by the UAW were permissible as representations of a historical fact. This error went to the heart of whether the Union's conduct coerced the employees in their free choice. Accordingly, the Hearing Officer's report must not be adopted, and the election results must be set aside.

B. Objections 1 and 4: The evidence shows that the Union leveraged its longstanding relationship with GM to negotiate a firm, last-minute commitment from GM to subsidize EMS wage increases at the bargaining table.

In the critical period leading up to an election, a union crosses the line and coerces the employees' free choice when the union makes promises that it has the ability to back up. In *Alyeska Pipeline Service Co.*, 261 N.L.R.B. 125 (1982), union organizers told employees during an organization campaign that most of the jobs in Alaska were union jobs, that there were two large projects coming up in the future, and that employees who joined the union would receive priority against those who did not. The Board found that these representations interfered with the employees' freedom of choice because the union had the ability to deliver:

[W]e view them to be more akin to an employer's promise to grant benefits if the Union loses, or an Employer's threat of plant closure if the Union wins. In each of these situations the party making the coercive statement has the power to effectuate the promise or the threat, as the case may be, and suggest "a fist inside the velvet glove."

261 N.L.R.B. at 127 (footnote omitted). Because the union in *Alyeska* controlled the access to jobs, the union "possesse[d] a power comparable to the Employer's power to close a plant." *Id.* As a result, the Board found that the union's promise to give an advantage to union members interfered with the employees' right to express their wishes in the election free of coercion. *Id.*

As in *Alyeska*, the UAW made an impermissible promise that it could effectuate: "GM purchasing has committed to the uaw inl union to compensate EMS for your wage and benefit increases if you guys form your union." (Report at 5.) Given the long-standing history of bargaining between the UAW and GM, the employees knew the UAW was capable of backing up its promises and understood they had to vote "Yes" to access the GM subsidies.

To demonstrate the impermissible nature of the union's representations, consider whether EMS could have lawfully made the same sorts of representations to the employees. Imagine that EMS had contacted GM and asked for an increase in its billing rate so that it could offer higher wages to its employees if they remained union-free. Then imagine that on the day before the election, EMS announced that GM had agreed to subsidize wage increases for the EMS employees *if they voted against the Union*. There is little doubt such actions would have coerced the employees' free choice. An employer is not allowed to condition wage increases on remaining union-free. Due to the long-standing relationship between GM and the UAW, the Union's representations here were no less coercive.

The Union has tried to minimize its influence in securing access to the GM subsidies by arguing that any gains will still need to be bargained with EMS. This argument fails because the benefit that was supplied to the employees by the Union – access to the GM subsidies – has

already been secured by the Union on the employees' behalf. GM will not be at the bargaining table and, according to the Hearing Officer's report, there is no evidence that GM will refuse to provide the supplemental funds. (*See* Report at 10.) Thus, the Union is the gatekeeper for this benefit, as there is no evidence that EMS or any other union can access the GM subsidies themselves. (*Id.* at 6.) Indeed, the billing rate increase that EMS was told by GM would be available to fund wage increases has not been provided to EMS to date, as that decision has been put on hold by GM pending the outcome of this election. (*Id.*) Thus, the UAW's statements left the unmistakable impression that the union's representation was a foregone conclusion. *Cf. Garner/Morrison, LLC*, 356 N.L.R.B. No. 163, 2011 WL 2132216, at *7-9 (May 27, 2011) (union unlawfully accepted recognition in violation of 8(b)(1)(A) when it entered into memorandum agreement with employer without an election).

The UAW leveraged its access to the GM subsidies as a bargaining chip to coerce the employees into voting for the Union. At no point in time before the eleventh hour did the Union ever suggest to employees that GM had already agreed to subsidize higher wages for EMS employees regardless of unionization. Rather, the Union announced a last-minute deal with GM, at a time when EMS could not respond, to subsidize wage increases at the bargaining table if the Union won the election. The announcement changed everything and plainly interfered with the employees' free choice. Accordingly, the Hearing Officer's decision should not be adopted and the election results should be set aside.

III. Conclusion.

For the reasons set forth herein, the Company respectfully requests that the Board decline to adopt the report and recommendations made by the Hearing Officer and instead set aside the tainted election results.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Brief in Support of the Employer's Exceptions to the Hearing Officer's Report" has been served upon the following counsel of record, by email and by first-class, United States mail, postage prepaid, this 26th day of April, 2013:

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